Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

TU YING CHEN, individually and as administratrix of the estate of SHOU FONG CHEN,

Petitioner,

vs.

VICTOR L. SCHRAMM, JR., M.D., and VICTOR L. SCHRAMM, JR., M.C., P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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16 pp

QUESTION PRESENTED

Was the petitioner deprived of property without Due Process of Law when she was not allowed to advise the court that she had received an expert's opinion required by the court and her case was later dismissed?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was March 24, 1997. A copy of that decision appears at

Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Petitioner filed suit on April 22, 1993 for wrongful death arising out of medical malpractice against Respondent Victor L. Schramm, Jr., M.D., a physician licensed to practice medicine in the state of Colorado, and Victor L. Schramm, Jr., M.D., P.C., a professional corporation of health care providers.

On May 31, 1994, the Respondents filed a Motion for Summary Judgment to dismiss the case. At the time of this action, the Petitioner had no counsel. Petitioner flew to Denver for the hearing on March 20, 1995. Petitioner attempted to present evidence of medical malpractice resulting in wrongful death as determined by medical experts when the Judge ordered her to stop. Petitioner did not get a chance to present the evidence obtained through qualified experts that Respondent Dr. Victor Schramm deviated from accepted medical practice. Petitioner was not permitted to present any evidence that Dr. Schramm had engaged in an experimental procedure which led to the death of her husband and that Dr. Schramm had lied about the procedure.

On April 26, 1995, the Trial Court granted Respondents' Motion for Summary Judgment in favor of Respondents and against Petitioner. Summary judgment was not granted due to any fault of petitioner. On the date when summary judgment was granted, petitioner appeared in court with an attorney and attempted to present competent expert evidence which she then had in her possession. The adjournments prior thereto were due primarily to the defendants and their failure to produce medical records.

REASONS FOR GRANTING THE PETITION

Summary judgment was not granted due to any fault of the petitioner. Petitioner appeared in court and attempted to tell the court that she had the expert's opinion required by the court for her to oppose the Motion for Summary Judgment. But the court did not allow the petitioner to speak.

Petitioner believes that she had a Due Process right to speak when she came to court. When the court did not permit her to speak, her appearance and trip from New York became meaningless. How could she possibly hope to prove that the Motion for Summary Judgment should have been denied if she could not explain to the judge that she had the expert opinion in her possession?

Petitioner believes that there are decisions of other state appellate courts that conflict with the decision of the Colorado Court of Appeals in this case. But even if there are no decisions that conflict with the decision of the Colorado Court of Appeals, petitioner believes that this case presents an important question of federal law that either has not been settled by this Court or that conflicts with relevant decisions of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tu Ying Chen
Dated: June 19, 1997

APPENDIX

Appendix

COLORADO COURT OF APPEALS August 1, 1996
No. 95CA0748 **NOT SELECTED FOR PUBLICATION**

Tu Ying Chen, individually and as administratrix of the estate of Shou Fong Chen,

Plaintiff-Appellant,

v.

Victor L. Schramm, Jr., M.D., and Victor L. Schramm, Jr., M.D., P.C.,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver Honorable Richard T. Spriggs, Judge
No. 93CV2231

Division II JUDGMENT AFFIRMED
Opinion by JUDGE MARQUEZ
Plank and Ney, JJ., concur

Palmer & Paoli, P.C., Jeffrey A. Esses, Denver, Colorado, for Plaintiff-Appellant

Johnson, Ruddy, Norman & McConaty, P.C., Collie E. Norman, Marci L. Laddusaw, Denver, Colorado, for Defendant-Appellee

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Plaintiff, Tu Ying Chen, appeals the summary judgment entered in favor of defendants, Victor L. Schramm, Jr. and Victor L. Schramm, Jr., M.D., P.C. We affirm.

The facts are undisputed. After her husband died following surgery performed by defendant Schramm, plaintiff filed a complaint on April 28, 1993, alleging professional negligence. Plaintiff, a New York resident, was represented by counsel in Colorado and New York.

In May 1994, defendants moved for summary judgment asserting that plaintiff lacked the requisite competent expert testimony necessary to establish her allegations of negligence. Plaintiff's counsel, who were unaware that their motion to withdraw had been granted two days earlier, requested that plaintiff be allowed additional time to respond to the motion with her expert information.

On July 11, 1994, the court issued an order allowing plaintiff until August 8, 1994, to show cause as to why the action should not be dismissed. On or about August 8, 1994, the court received a letter from plaintiff which the court treated as a motion for continuance and granted.

By October 24, 1994, plaintiff had retained new local and New York counsel. During a status conference on October 31, 1994, the court ordered plaintiff to respond to the motion for summary judgment within 45 days. However, on December 16, 1994, plaintiff again requested additional time to file the required expert affidavit. The court allowed plaintiff until January 16, 1995, to file her response, and the parties subsequently agreed to extend the time up to and including January 27, 1995.

When plaintiff did not file an expert affidavit, defendants requested a ruling on the motion for summary judgment. At a hearing held on March 20, 1995, the trial court found that plaintiff had failed to produce any affidavits or other evidence sufficient to establish a genuine issue as to any material fact with regard to the standard of care and causation and granted defendants' motion for summary judgment.

Plaintiff argues that defendants failed to prove the absence of any genuine issue of material fact. We disagree.

Under C.R.C.P. 56(c), summary judgment is proper when the pleadings, affidavits, depositions or admissions establish that there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. The moving party's initial burden of production may be satisfied by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. *Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708 (Colo. 1987).

Once the moving party has met this initial burden, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. If the nonmoving party cannot muster sufficient evidence to make out a triable issue of fact, a trial is useless and the moving party is entitled to summary judgment as a matter of law. *Continental Air Lines, Inc. v. Keenan, supra.*

In a medical malpractice case, it is generally incumbent upon the plaintiff to prove by expert testimony that the defendant departed from the standard of care required of the defendant as a physician. If no standard is established by expert testimony in those cases in which such testimony is required, there is no standard for the determination of the ultimate question of the physician's negligence. *Miller v. Van Newkirk*, 628 P.2d 143 (Colo. App. 1980) (when patient offered no expert testimony attesting to a physician's negligence and the pleadings and affidavits did not indicate that such testimony would be forthcoming at trial, the physician was entitled to summary judgment).

Here, plaintiff's failure to provide expert testimony that defendant's conduct fell below the applicable standard of care operated to shift the burden to plaintiff to present evidence that would raise a genuine triable issue as to the propriety of defendant's conduct. Plaintiff failed to provide such evidence. *See Sullivan v. Davis*, 172 Colo. 490, 474 P.2d 218 (1970) (responding party cannot create a genuine issue simply by means of argument, statements of counsel, or speculation.)

Plaintiff's reliance on her certificate of review filed pursuant to §13-20-602, C.R.S. (1987 Repl. Vol. 6A) as evidence sufficient to overcome the summary judgment motion is misplaced.

A certificate of review must be filed in civil actions where expert testimony would be necessary to establish a prima facie case. Section 13-20-601, C.R.S. (1987 Repl. Vol. 6A). However, a certificate of review is not a substitute for sworn expert testimony required by C.R.C.P. 56(e) to establish a genuine dispute.

Plaintiff also contends that the trial court abused its discretion in refusing her request for additional time within which to obtain the necessary affidavit to oppose the summary judgment motion. We disagree.

Entry of summary judgment is error if the opposing party is denied an opportunity to demonstrate that summary judgment is inappropriate. *Ferrera v. Nielsen*, 799 P.2d 458 (Colo. App. 1990). However, a plaintiff has the burden to prosecute a case in due course without unusual or unreasonable delay. *BA Leasing Corp. v. Board of Assessment Appeals*, 653 P.2d 80 (Colo. App. 1982).

Here, plaintiff had more than an adequate opportunity to furnish an opposing affidavit. The motion for summary judgment was filed more than a year after plaintiff filed her complaint, and it was almost a year later when it was granted. In dismissing the case, the trial court considered that the case had been pending for almost two years, had gone through repeated continuances, and that multiple extensions of time had been granted.

We conclude that plaintiff was not denied an opportunity to demonstrate that summary judgment was inappropriate, and we perceive no error.

Plaintiff claims that she should not be punished with the dismissal of her claims on the basis of her attorney's gross neglect. We are not persuaded.

In certain cases, negligence of an attorney is a reason to set aside a default judgment under the good cause standard of C.R.C.P. 55(c). However, contrary to plaintiff's assertion, the trial court did not dismiss the case for negligence on the part of plaintiff's attorneys, but rather on the grounds that, after numerous changes of counsel and multiple extensions of time, plaintiff had failed to produce any qualified physician who was willing to come forward and opine that defendant's conduct violated the standard of care. Therefore, we find no error.

Plaintiff also contends that the trial court abused its discretion in awarding the cost of copies of documents as an element of costs because defendant did not show that the copies were necessarily obtained for use in the case. We disagree.

Section 13-16-122, C.R.S. (1987 Repl. Vol. 6A) lists certain items includable as costs. The list is merely illustrative and not exclusive. *Church v. American Standard Insurance Co.*, 764 P.2d 405 (Colo. App. 1988). In general, absent a specific prohibition, the trial court has discretion over the awarding of costs. *Rossmiller v. Romero*, 625 P.2d 1029 (Colo. 1981).

We find no abuse of discretion as to the trial court's award of the costs of the copies.

The judgment is affirmed.

JUDGE PLANK and JUDGE NEY concur.

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SC714
CERTIORARI TO THE COLORADO COURT OF APPEALS, 95CA0748
DISTRICT COURT, CITY AND COUNTY OF DENVER, 93CV2231

ORDER OF COURT

TU YING CHEN, Individually and as Administratrix of the Estate of Shou Fong Chen, Deceased,

Petitioner,

v.

VICTOR L. SCHRAMM, JR., M.D.; and VICTOR L. SCHRAMM, JR., M.D., P.C.,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, MARCH 24, 1997.

cc:

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Patrick H. Stanford, Clerk
Colorado Court of Appeals

SUPREME COURT

STATE OF COLORADO

Supreme Court
State of Colorado
Certified to be a full, true and correct copy

MAR 24 1997

MAC V. DANFORD
Court Clerk of the Supreme Court
Seal

By .....
Deputy Clerk

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